

B [CIVIL SERV NO. ZINCEVC-18
5 DECEMBER 2016

C *Planning Act 1976, ss. 18, 19 & 20*

The defendant was a private limited company with the nature of business in property development. The defendant was formerly known as Valiant Wealth Sdn Bhd. The shareholders of the defendant were Malaysian Land Properties Sdn Bhd. Malaysia Land Properties Sdn Bhd submitted an application for planning permission on lands known as Lot 4244 and 4245 ('the said lots') ('first application') to the plaintiff for the proposed development of the said lots which included, amongst others, five blocks of 23 storey commercial serviced apartments and one block of 23 storey commercial serviced apartments connecting to a hotel building known as Grand Dorsett Hotel located on the said lots. The first application was refused by the plaintiff, *inter alia*, on the ground that the number of car parking bays provided was insufficient. Subsequently, Valiant Wealth Sdn Bhd submitted an application for planning permission for a proposed development on the said lots ('second application'). The second application was also refused. The defendant then submitted for a planning permission ('third application') towards part of the existing Grand Dorsett Hotel building. The plaintiff considered the third application under s. 22(3) of the Town and Country Planning Act 1976 ('TCPA') and decided to grant planning permission to the defendant. The plaintiff processed the third application as a non-strata title hotel on the basis that the defendant did not intend to sell the Hotel Suites. The defendant then applied to the Ministry for a Housing Developer license and an advertisement for sale permit respectively. The Controller of Housing, National Housing Department, Ministry of Housing and Local Government issued a Housing Developer license and an advertisement for sale permit for the purpose of selling the units. The defendant sold the units in the hotel suites building as hotel apartments contrary to the plaintiff's planning permission. The plaintiff's claim was essentially on the sale of the hotel suites proposed on the said lots and the validity of the planning permission, building plan and notice of commencement/continuation of work. The defendant averred that they were not required under any of the planning Acts, Regulations or guidelines to declare to the plaintiff that the hotel suites in the project would be sold. In that regard, the plaintiff had no powers to direct or impose conditions on the defendant on the sale of the hotel suites as the matters concerning the sale

of the development fell under the purview of the Ministry of Urban Well being, Housing and Local Government ('MHLG'); not the local authority. Hence, the defendant counter claimed against the plaintiff.

Held (allowing plaintiff's claim with costs; dismissing defendant's counterclaim):

- (1) The term hotel suite was for all intents and purposes of the planning application was processed and granted as a hotel development based on existing guidelines, local plan, zoning and documents submitted by the defendants. The proposal report of the third application submitted by the defendant to the plaintiff was that hotel suites were hotel rooms and were not for sale. Further, since the planning permission was granted for non-strata title development there was no requirement to impose a condition that the hotel suite could not be sold. Therefore, the plaintiff did not intend to approve any development on the said lots which involved commercial and business including the development of commercial serviced apartments. (para 41)
- (2) The defendant's submission that the defendant's intention to sell the hotel suites lay in the submission the building plan for the construction of the show gallery and sale office to the plaintiff. The show gallery, according to the defendant, signified that the hotel suites were for sale. The building plan for the exhibition space and sales office was submitted as a separate application under the Street, Drainage and Building Act 1974. The construction of exhibition space and sale office was not included in the 'tambahan kepada hotel sedia ada' and was not listed out as a component of the proposed development in the planning permission. Likewise, the development proposal report for the proposed development also did not refer at all to the component of exhibition space and sales office. Therefore, the exhibition space and sale office were not related to the planning permission and did not specify that it was meant for the sale of hotel suites. (paras 54 & 55)
- (3) The issuance of the Advertisement and Sale Permit together with Housing Developer's Licence approved by MHLG was under the pretext of the sale of Serviced Apartment. Therefore, the Advertisement and Sale Permit together with the Housing Developer's Licence granted, though were valid, was not applicable and of no legal effect to the hotel suites. Furthermore, the selling of hotel suites as serviced apartments was contrary to the Planning Permission and would tantamount to a unilateral change to the use of the land from hotel accommodation to serviced apartments. This obviously had deviated from the Planning Permission, Local Plan, Manual Guidelines and Planning Standards of State of Selangor. It followed that the defendant was not permitted to proceed with the sale of the hotel suite as it constituted a contravention of the planning control and/or the planning permission granted by the

- A plaintiff. The defendant had contravened ss. 18 and 19 or 20 of the TCPA and had also committed a breach of planning control by deviating or departing from the planning permission granted for hotel suites. The defendant was not entitled for damages under the counterclaim for the reason that the defendant could not take advantage of their own wrongdoing. (paras 57, 58 & 59)
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Case(s) referred to:

Government of the State of Sarawak v. Lah Anyie & Ors [2013] 6 CLJ 133 CA (*refd*)
North East Plantations Sdn Bhd v. Pentadbir Tanah Daerah Dungun & Satu Lagi [2011] 4 CLJ 729 FC (*refd*)

- C *Sumita Development (M) Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2014] 9 CLJ 406 HC (*refd*)

Legislation referred to:

Housing Development (Control And Licensing) Act 1966, s. 3A

Local Government Act 1976, ss. 3, 4(1), (2), (3)

Planning Control (General) (Selangor) Rules 2001, r. 2(1)

- D Street, Drainage and Building Act 1974, s. 70(1), (6), (9)
Town and Country Planning Act 1976, ss. 18, 19, 20, 21(6), 21A, 22(3), 23, 24(1), (2), (3)

For the plaintiff - Karin Lim, Murgan & Shamila; M/s Presgrave & Matthews

For the defendant - Lai Wai Fong & TT Toi; M/s Shearn Delamore & Co

- E *Reported by Sandra Gabriel*

JUDGMENT

Rozana Ali Yusoff JC:

- F **Introduction**

[1] The plaintiff is the Local Authority established pursuant to s. 3 of the Local Government Act 1976 (LGA 1976) by the State Authority of Selangor Darul Ehsan. The plaintiff also is the Local Planning Authority for Subang Jaya area pursuant to the Town and Country Planning Act 1976 (TCPA 1976) in respect of the lands known as Lot 4244 and 4245, Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan (the said lots). Among other responsibilities, the plaintiff is responsible to enforce the Street, Drainage and Building Act 1974 (SDB 1974) and the Uniform Building By-Laws 1984 (UBBL 1984).

- H [2] Pursuant to sub-s. 4 (1), (2) and (3) LGA 1976, the State Authority of Selangor after consultation with the Minister of Housing and Local Government, District of Petaling Council and the Secretary of the Election Commission had upgraded the status and changed the name of District of Petaling Council to Municipal Council of Subang Jaya and further altered and fixed the boundary of the Municipal Council of Subang Jaya according to the Gazetted Plan No. 1192 commencing from 2 January 1997.
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[3] The defendant is a private limited company with the nature of business in property development. The defendant was formerly known as Valiant Wealth Sdn Bhd. The shareholders of the defendant are Malaysian Land Properties Sdn Bhd (Company No 334713-X)

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Background Facts

[4] The factual matrix of the case pertains to a hotel building known as Grand Dorsett Hotel (formerly known as Sheraton Subang Hotel) which is located on the said lots. The existing hotel building was approved as one block title hotel and also as a non-strata title hotel *vide* the building plans. The said lots are fronting the main road known as Jalan SS12/1, Subang Jaya. Jalan SS12/1 is used by the residents of Wangsa Baiduri, SS12, Holiday Villa Hotel, Subang Jaya Medical Centre (SJMC) and by Grand Dorsett Hotel.

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[5] On 4 May 2007, Malaysia Land Properties Sdn Bhd submitted an application for Planning Permission No. 1/530 for proposed development on the said lots (first application'). The proposed development included:

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- (a) 5 Blocks 23 Storey Commercial 'Serviced Apartment' (944 units); and
- (b) 1 Block 23 Storey Commercial 'Serviced Apartment' (322 units) connecting to the existing hotel.

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[6] Since the development area does not have a local plan, the plaintiff served notices to the neighbouring land owners regarding the first application in accordance s. 21(6) of the TCPA 1976 and had received objections from the neighbouring land owners against it.

[7] On 29 August 2007, the first application was refused by the plaintiff, *inter alia*, on the ground that the car parking bays requirement for Commercial 'Serviced Apartment' is two (2) bays for every one (1) unit of apartment. Number of bays provided is insufficient.

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[8] On 18 November 2008, Valiant Wealth Sdn Bhd submitted an application for Planning Permission No. 1/530 for a proposed development on the said lots (second application). The proposed development, *inter alia*, included:

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- (a) Five Storey Commercial Space;
- (b) Addition to Existing Hotel Building;
- (c) 1 Building 19 Storey Hotel Apartment with lobby; and
- (d) 1 Building 19 Storey Serviced Apartment with lobby.

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[9] On 18 August 2009, the second application was also refused, *inter alia*, on the ground that:

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- A (a) Serviced apartment and business space proposal are not allowed;
(b) Multi-purpose development proposal other than hotel use will increase the traffic congestion at Jalan SS12/1 which appears as the only access road to the area of SS12; and
- B (c) Proposed connection road at Subang Ria Lake Gardens cannot be made as the second proposed access of this development proposal as the development proposal of Subang Ria Lake Gardens has not been submitted by Sime Darby Properties Sdn Bhd yet.
- C [10] Valiant Wealth Sdn Bhd did not make an appeal to the appeal board pursuant to s. 23 of the TPCA 1976 against the refusal of the application for planning permission by the plaintiff.
- D [11] On 2 March 2010 the defendant had submitted for Planning Permission No 1/530 Jld 3 for a proposed “addition and alteration on the said lots (third application) towards part of the existing Grand Dorsett Hotel building and proposed development consisting of:
(a) addition to existing hotel building;
(b) two blocks 17 storey hotel suite (1989 rooms) building with lobby;
(c) one storey recreational space and swimming pool
- E (d) one storey basement car parking place; and
(e) five storey car parking place.
- F [12] The defendant in its development proposal report specified amongst others that the third application will able to enhance the hotel industry in this country and increase the facilities and number of hotel room for measuring the grading the Grand Dorsett Hotel.
- G [13] On 5 October 2010, the plaintiff considered the third application under s. 22(3) of the TPCA 1976 and decided to grant planning permission to the defendant subject to conditions and in accordance with the lay-out Plan No MPSJ P.S. 260/1/530 Jld 3 (40) (the layout plan). The plaintiff processed the third application as a non-strata title hotel on the basis that the defendant did not intend to sell the hotel suites located in the proposed two block 17 storey hotel.
- H [14] On 27 December 2011 and 11 January 2012, the defendant applied to the Ministry for a Housing Developer license and an advertisement for sale permit respectively. The Controller of Housing, National Housing Department, Ministry of Housing and Local Government issued the housing developer license on 16 January 2012 and advertisement for sale permit on 15 March 2012 for the purpose of selling the units.
- I [15] In early April 2012, the plaintiff received complaints from Subang Jaya residents that the defendant had sold the rooms to the public. The plaintiff also found that the defendant had advertised the sale of the rooms in the two (2) blocks of hotel suite in the newspaper and the internet webpage.

[16] The defendant had sold the units in the two blocks of the 17 storey hotel suites building which contain 1989 rooms to many purchasers pursuant to the sale and purchase agreement (SPA) as hotel apartments in contrary with the plaintiff's planning permission. The SPA has been executed between the defendant and purchasers and Subang Jaya Hotel Development Sdn Bhd as registered proprietor of the said lots. The plaintiff's claim is essentially the objection to the sale of the hotel suites proposed on the said lots by the defendant and the validity of the planning permission, building plan and notice of commencement/continuation of work.

The Claims

[17] The plaintiff claims against the defendant as follows:

- (a) A declaration that the planning permission dated 5 October 2010 together with the Layout Plan No. MPSJ. PS. 260/1/530 Jld 3 (40) granted by the plaintiff to the defendant is meant for the use of hotel only;
- (b) A declaration that the defendant does not have a valid planning permission as at 5 October 2011 in respect of the following:
 - (i) to build additions to existing hotel building;
 - (ii) to build two block 17 storey hotel suite (1,989 rooms) building with lobby;
 - (iii) to build one storey recreational space and swimming pool;
 - (iv) to build one storey basement car park; and
 - (v) to build five storey car park on the said lots 4244 and 4245.
- (c) A declaration that the Building Plan No. MPSJ/BGN/KW/A-6/162 approved on 28 December 2011 by the plaintiff is *ultra vires*, invalid, unlawful and cannot be relied upon by the defendant under any circumstances;
- (d) A declaration that the Building Plan No. MPSJ/BGN/KW/A-6/162 approved on 28 December 2011 by the plaintiff is invalid and of no legal effect from the outset for all purposes and that no lawful consequences can flow from it;
- (e) A declaration that the notice of commencement of building works 'submitted by the defendants' architect namely NRY Architects Sdn Bhd pursuant to s. 70(9) SDB 1974 is invalid and void and of no legal effect and the commencement of building works is in contravention of s. 70(1) of the SDB 1974;
- (f) A declaration that any building works commenced or any erection of building based on the lapsed planning permission is invalid and void after 5 October 2011.
- (g) A declaration that the planning permission dated 5 October 2010 together with the Layout Plan No. MPSJ.PS260/1/530 Jld 3 (40) granted to the defendant has not been implemented *vide* a valid building plan before the planning permission expired on 4 October 2011.

- A (h) An injunction restraining the defendant, their servants, their agents and/or otherwise howsoever forthwith from further continuing or carrying out any building works or erection of a building on lot 4244 and 4245, Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan based on the planning permission dated 5 October 2010 and the Building Plan No. MPSJ/BGN/KW/A-6/162 approved on 28 December 2011.
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- C (i) An injunction restraining the defendant, their servants, their agents and/or otherwise howsoever forthwith from using or permitting or allowing lots 4244 and 4245, Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan to be used for serviced apartments or hotel apartments without a valid planning permission and building plan approval.
- (j) An injunction prohibiting the defendant, their servants, their agents and/or otherwise forthwith from constructing additions to the existing hotel and/or erecting strata title serviced apartments or strata title hotel apartments on lots 4244 and 4245, Mukim Damansara, Petaling District, Selangor Darul Ehsan based on the planning permission dated 5 October 2010 that has lapsed and Building Plan No. MPSJ/BGN/KW/A-6/162 that is invalid, void and unlawful.
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- (k) Cost and other reliefs that the court deemed just and fit.

E **The Defence**

[18] The defendant claims that the Grand Dorsett Hotel offers rooms and suites for accommodation on a long term basis and not merely for domestic and foreign tourist on a short term stay. The proposed development by the defendant involves on the said lots known as Grant No. 38842 Lot No. 4244, and Grant No. 38843 Lot No. 4245.

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[19] The defendant avers that they are not required under any of the planning acts, regulations or guidelines to declare to the plaintiff that the hotel suites in the project would be sold. In that regard, the plaintiff has no powers to direct or impose conditions on the defendant on the sale of the hotel suites as the matters concerning the sale of the development falls under the purview of the Ministry of Urban Wellbeing, Housing and Local Government (MHLG); not the Local Authority.

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[20] At the time defendant's application was made to the plaintiff on 12 February 2010, the development concepts such as 'serviced apartments', 'hotel apartments' and 'hotel suites' were not statutorily defined in any of the planning acts and regulations. Neither did any of the planning acts and regulations contain any statutory building specifications for these development concepts. In the absence of any statutory definition on these development concepts or building specifications of these concepts therefore, there is nothing sinister in the defendant submitting an application for the development of hotel suites in the project premised upon the planning criteria and planning standards applicable to hotels; as opposed to 'serviced apartments'.

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[21] The plaintiff has attempted to provide three explanations as to why the said lands were intended for hotel use only. None of these purported explanations were substantiated by the minutes of the “Mesyuarat Jawatankuasa Pusat Setempat” (OSC) on 5 October 2010, as the plaintiff merely produced extracts of the same. The plaintiff must be aware of the sale of the hotel suites since it had approved the building plan for the construction of the Show Gallery & Sales Office, which was riding on the planning permission.

[22] The building plan was approved by the plaintiff during the OSC Meeting of 2 August 2011, when the planning permission was still valid. Consequently, all subsequent approvals are valid and to date, the plaintiff had done nothing to stop the project.

[23] The commencement of this suit adversely affects and prejudices more than a thousand innocent purchasers who bought the hotel suites in the project in reliance upon the planning permission granted in favour of the defendant, which was never revoked. It also had adversely affects and prejudices the defendant and of bad faith. Hence for these reasons, the defendant counterclaimed against the plaintiff for abuse of court process.

[24] The defendant’s counterclaims are as follows:

- (a) A declaration that the building plan which was submitted pursuant to the planning permission dated 5 October 2010 and approved by the plaintiff on 28 December 2011 is valid and subsisting;
- (b) A declaration that the notice of commencement of building works submitted on 16 March 2012 by the defendant’s architect, NRY Architects Sdn Bhd pursuant to the planning permission granted on 5 October 2010 is valid and subsisting;
- (c) An order that the defendant is entitled to be indemnified in full for the following:
 - (i) Damages suffered by the defendant as a result of the termination of the sale and purchase agreement in respect of the sale of the hotel suites by the purchasers;
 - (ii) Damages suffered by the defendant as a result of the cancellation of the reservation for the purchase of the hotel suits by potential purchasers;
 - (iii) Damages suffered by the defendant as a result of the claims for liquidated ascertained damages by the purchasers of the hotel suites against the defendant;
 - (iv) Loss of profit; and
 - (v) Wasted expenditure incurred by the defendant;
- (d) Cost and other relief the court deems fit.

A Witnesses

[25] The witnesses for the plaintiff are:

	Witness	Names	Position
B	PW1	Ismail bin Muhamad	Director Planning Department
	PW2	Hazman bin Mohd Mahayudin	Deputy Director Planning Department.
C	PW3	Nor Azmi bin Haji Mohd Rosli	Senior Assistant Director Building Department
	PW4	Dato Asmawi bin Kasbi	Retiree and Former President of the Plaintiff
D	PW5	Mohd Nazrul Shukri bin Ali	Officer from Selangor Land and Mine Office

[26] The defendant witnesses are:

	Witness	Names	Position
E	DW1	Suhaimi Sawal	Senior Assistant Secretary, Ministry of Social Wellbeing, Housing and Local Government.
	DW2	Mohd Zaime bin Misri	Assistant District Officer of Petaling District
F	DW3	Tan Ching Kee	Architect of NRY Architects Sdn Bhd
	DW4	Low Gay Teck	Director of Mayland group of Companies
G	DW5	Loh Pooi Ling	Executive Director of Defendant
	DW6	David Chiu	Chairman, Mayland group of Companies
H	DW7	Leow Soon Huat	Group Chief Executive Officer Mayland Group of Companies.

Issues

I [27] There are nine issues submitted by the parties to be determined by the court namely:

- (a) Whether the planning permission dated 5 October 2010 together with the Layout Plan No. MPSJ.PS.260/1/530 Jld 3 (40) ('third application') is meant for the use of hotel accommodation only. A
- (b) Whether the defendant have a valid planning permission as at 5 October 2011. B
- (c) Whether the Building Plan No. MPSJ/BGN/KW/A-6/162 approved on 28 December 2011 is *ultra vires*, invalid, unlawful and of no legal effect. B
- (d) Whether the notice of commencement of building works submitted by defendant's architect on 16 March 2012 pursuant to s. 70(9) SDB 1974 is invalid and void and of no legal effect. C
- (e) Whether any building works commenced or any erection of building based on the lapsed planning permission is invalid and void after 5 October 2011.
- (f) Whether the hotel suites may be sold individually or separately to any person. D
- (g) Whether the sale of the hotel suites by the defendant constitutes a contravention of the planning control and/or the planning permission granted by the plaintiff.
- (h) Whether the plaintiff is estopped from insisting and contending that the planning permission had expired on 5 October 2011 and that the subsequent building plan approval by the plaintiff and the notice of commencement of building work submitted by the defendant are void, invalid and no legal effect. E
- (i) The relief which the plaintiff may claim against the defendant. F

Evaluation And Findings

[28] By the evidence from all the witnesses and the submission by the parties, I am of the view that all the nine issues can be narrowed down and be consolidated to three issues. G

[29] The first issue to be determined is whether the planning permission dated 5 October 2010 together with the Layout Plan No MPSJ.PS.260/1/530 Jld 3 (40) (the third application) was meant for the use of hotel only.

[30] I took noted that prior to this planning permission dated 5 October 2010 and the Layout Plan No MPSJ.PS.260/1/530 Jld 3 (40) (the third application), there were two (2) applications made for the development on the said lots which were both rejected by the plaintiff. In understanding the purpose of the above planning permission, it is prudent to examine the planning history of the first two applications made earlier in respect of the development on the said lots. H
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- A [31] The evidence shows that the master lot for the said lots previously known as Lot 1131 and the master layout plan was approved by the Town and Country Planning Department of the State of Selangor sometime in 1980 for the purposes of Lodging House and Rest House. The said lots then were issued with land titles, namely No. H.S. (D) 3677 and H.S. (D) 3678 with the express condition specified as follows:
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The land which is meant shall be used for the purpose of Lodging House and uses which is incidental with it.

(Tanah yang dimaksudkan ini hendaklah digunakan untuk maksud Rumah Tumpangan dan kegunaan-kegunaan yang bersangkutan dengannya)

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- D [32] I took cognizance that the first application by the defendant for commercial serviced apartment was rejected amongst others on the ground that the number of car and motorcycle parking bays were insufficient and there were objections from the neighbouring land owners. Whilst the second application was also rejected on the ground that hotel apartment, serviced apartment and commercial space proposal were not allowed on the said lots because of its high intensity would obviously generate increase of traffic congestion. The defendant, on the other hand, contended that the first and second applications were not rejected by the plaintiff *in limine* on the ground
- E that the development of serviced apartment and hotel apartment respectively were not a recognised term under the 1984 Building By Laws.

- F [33] At this juncture, I am unable to accept the defendant's contention because the defendant did not even make an appeal to the appeal board pursuant to s. 23 of the TPCA 1976 against the refusal of the application for the planning permission by the plaintiff. I am satisfied that the defendant has accepted the decision and has full knowledge of the reasons for the refusal of the first and second applications due to its purpose for other kinds of buildings or activities other than hotel accommodation. In fact the principal submitting person for the defendant, ie, Citiplan Networks, for the first and
- G second applications was the same person that has knowledge of the history of the submission. I am of the view that the relevance of the planning history at the development site cannot be disregarded as it provides evidence of the importance of the permitted activity namely hotel use on the development site.

- H [34] The defendant then submitted the third application which consists of an addition and alteration to existing Grant Dorsett Hotel Building; Block 17 Storey Hotel Suite (1,989 rooms) Building with lobby; One(1) storey Recreational space and swimming pool and One (1) storey base car parking place.

- I [35] The defendant contended that hotel suite is equivalent to serviced apartments, *inter alia*, of the followings:

- (a) Section 3A Housing Development (Control And Licensing) Act 1966 (Act 118) (HDA) that the hotel suites constitute housing accommodation and therefore can be sold as serviced apartment

- (b) The said lots have been amalgamated and a final title was issued. The final document of title Form 5BK 314048 to the combined lands, which removed the earlier express condition and was replaced the same with “Bangunan Perniagaan”. Therefore the defendant is entitled to proceed with a strata development in accordance with the procedures provided in the Strata Title Act (STA) and HDA. A
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- (c) The plaintiff has absolutely no power to impose a condition prohibiting the sale of the hotel suites on the planning permission. The sale of the hotel suites is regulated in the Housing Development (Control and License) Act 1966 with relevant Regulations that is intended to provide for control and licensing of the business of housing development for the protection of the interest of purchasers and is in the purview of MHLG and not the plaintiff. C

[36] In arriving to the answer of the first issue and upon submission by both parties, I have considered the following facts and evidence: D

- (a) The term “hotel” as stated in the original layout plan of the existing hotel building relates to a specific or special class of commercial building which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation and it opens its facilities to the public as a whole rather than limited accessibility to a well-defined private group. The term “hotel” as stated in the express condition of HS (D) 3677 and HS (D) 3678 is stated as “Tanah yang dimaksudkan ini hendaklah digunakan untuk maksud Rumah Tumpangan dan kegunaan-kegunaan yang bersangkutan dengannya.” The term “Rumah Tumpangan” is within the definition of hotel in the UBBL 1984. E
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- (b) There is no statutory definition of hotel suites. The term hotel suite specified in the third application is not recognised or defined specifically in the Uniform Building By-Laws 1984. I observed that although the term hotel suite is not referred in the TCPA or structure plan or the local plan or planning regulations or planning guidelines the development proposal submitted by the defendant accorded with the requirements and the planning guidelines for development of hotel accommodation and not serviced apartment. Even the layout plan of the third application shows that the hotel suites are integrated with the existing hotel building. In para. 1 of Form A, the defendant clearly specifies that the use of the existing building on the land is a hotel building. Form A is the application for planning permission submitted in respect of the third application pursuant to r. 2(1) of the Planning Control (General) (Selangor) Rules 2001. G
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[37] Having said that, I am inclined that the term “hotel suite” in the third application would mean that it is a hotel accommodation as the planning guidelines and planning standards used and referred to the location and site of the proposed development on the said lots. This would reasonably bring I

- A to a conclusion that the hotel suites is an extension to the existing hotel building sharing all the common facilities. It also confirmed that the proposed development together with the existing hotel would not be subdivided into parcels or units or subject to a strata scheme. Thus, I find that the term “hotel suite” would reasonably relate to hotel accommodation and can be categorised as “hotel”.
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- [38] In reinforcing the inclination, I took further steps to compare all the three applications and is of the view that the first and second applications differs from the third applications in the sense that the first two applications are commercial in nature, *inter alia*, involving the development of serviced apartment whereas in the third application it involves the building of hotel suites and no mentioned of commercial serviced apartments. In fact, the words used in the title of the layout plan did not refer to commercial serviced apartment or serviced apartment or hotel apartment as in the first and second application. It merely uses the words hotel suites and which means hotel.
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- D The title in the layout plan also does not say that the third application is a strata development.

- [39] I also examined all the three (3) the development proposal report submitted by the defendant in accordance with s. 21A of the TCPA 1976. There is a fundamental difference between the development proposal report of the first and second application when compared with the development proposal report of the third application. The development proposal report of the third application did not specify that the hotel suites are actually serviced apartment and does not mention anything about sales of the hotel suites and whereas the development proposal report of the first and second application indicates the sale of the serviced apartment. Further, the development proposal report of the third application specifies that the planning standards of hotel would be applied and not the planning standards of serviced apartment. Further, in the said development proposal report for car parking bays accords with the minimum planning standard for hotel accommodation and not for serviced apartment. Even though the defendant submitted that there is no difference in the definition of hotel suites and serviced apartment, the Manual Guidelines and Planning Standards State of Selangor (First Edition) in regard to hotel provides one (1) car parking bay for every three (3) rooms whereas in regard to serviced apartment it provides two (2) car parking bays for every one (1) unit of serviced apartment. The total car parking bays required amounts to 1,179 units wherein for hotel, the number of car parking bays required amounts to 450 units and for hotel suites amounts to 729 units. The total number of car parking bays provided amounts to 1,329 units which is exceeding the number required but is not in conformity with the car bay for serviced apartment. This is very pertinent as it confirms that the whole development proposal of the third application is for purposes of hotel.
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[40] The amalgamation of the said lots was made to the Collector of District of Petaling in Form C dated 4 September 1991 and was approved for the purpose of the existing hotel building based on the express condition therein. The amalgamation of the said lots only takes effect from 14 October 2013 when the Land Administrator cancelled the old title of the said lots and until 13 October 2013 there is no changes as to the express conditions and even when the third application was submitted. The third application was approved based on the said lots and the land use specified in the master layout plan, Local Plan MPSJ 2020 and the planning guidelines. In fact all the three applications for planning permission, Form A, development proposal reports, layout plan, building plan referred to the said lots. The disclosure of amalgamation was only made known after the trial had commenced on 26 March 2015. The defendant contended that since the said lots had been amalgamated and the final title issued, the defendant is entitled to proceed with a strata development in accordance with the procedures provided in the STA and HAD respectively. I am unable to accept that the issue of amalgamation advanced by the defendant because the final title of the amalgamated the said lots was registered as lot 16 on 7 December 2013 with the new express condition and it cannot have any retrospective effect to the date of the grant of planning permission on 5 October 2010. From the facts above, I am of considered view, that had the amalgamation took place earlier, the plaintiff would have reasonably taken into consideration in approving the planning permission. Thus, I find that once the hotel suites is sold as serviced apartment, the use of land will changed and thereby will contravene the planning guideline, the local plan and the zoning and therefore will be inconsistent with the development proposal report and the traffic impact assessment which was submitted pursuant to TCPA.

[41] The term hotel suite was for all intents and purposes of the planning application was processed and granted as a hotel development based on existing guidelines, local plan, zoning and documents submitted by the defendants. The proposal report of the third application submitted by the defendant to the plaintiff is that hotel suites are hotel rooms and not for sale. Further, since the planning permission was granted for non-strata title development there is no requirement to impose a condition that the hotel suite cannot be sold. Therefore, I find that the plaintiff did not intend to approve any development on the said pots which involved in commercial and business including the development of commercial serviced apartment.

[42] The second issue to be determined is whether the defendant has a valid planning permission as at 5 October 2011. The related issues as to the building plan and the notice of commencement of building works will be dealt together.

[43] As to the issue whether the defendant have a valid planning permission as at 5 October 2011, the evidence revealed that the planning permission was granted by the plaintiff for a period of one (1) year from 5 October 2010 to 4 October 2011. According to 24(1) of the TCPA 1976,

- A a planning permission shall unless extended, lapse 12 months after the date of the grant, if, within that time, the development has not commence in the manner specified in the planning permission. Section 24(1) and (2) of the TCPA 1976 provides as follows:
- B (1) A planning permission granted under section 22(3) shall, unless extended, lapse twelve months after the date of the grant thereof if, within that time, the development had not commenced in the manner specified in the planning permission.
- C (2) Subsection (1) shall not apply to a planning permission that expressly states that the development for which the planning permission is granted does not involve any building operation.
- (3) On an application being made in that behalf in the prescribed manner before the planning permission lapses, the local planning authority may, on payment of the prescribed fee, grant an extension or further extension of the planning permission.
- D [44] From the evidence, the planning permission has lapsed on 5 October 2011 and the defendant did not comply with s. 24(1) and (3) of the TPCA. The defendant did not submit an application for extension of the planning permission before it lapsed and there was also no commencement of development. This is a statutory obligation where the defendant is bound to
- E comply and failing which it renders the defendant had abandoned their right to an extension as provided for in s. 24(3) of the TPCA. I am of the view that the obligation to submit the application for extension of the planning permission is imposed on the defendant. The plaintiff is not required to advise or inform the defendant of their obligation and duties to submit the
- F application for extension of a planning permission and this position was also confirmed by DW3.
- [45] The evidence also shows that the defendant was granted a conditional building plan approval on 2 August 2011 with conditions that the defendant is required to comply with a period of 60 days which expired on 7 October
- G 2011. The plaintiff also notified that the full approval of the plan will only be issued after the conditions have been complied. Any construction work at the site is not permitted until the full approval letter is issued. The defendant was also informed that if they fail to comply accordingly, the conditional building plan approval are deemed to be withdrawn automatically under s. 70(6) of the SDB 1974 and that any appeal regarding
- H the cancellation will not be considered. The building plan was approved on 28 December 2011 subject to conditions and that the approval is valid for a period of one (1) year from 28 December 2011 to 27 December 2012. Nevertheless, at this material time, the planning permission had lapsed. As a note, the planning permission granted on 5 October 2010 expired on
- I 4 October 2011. On 5 October 2011, the planning permission lapsed as there was no application submitted by the defendant for its extension.

[46] I took cognizance that the planning permission must be valid before the building plan can be approved. The legal basis for the approval of the building plan is that the planning permission for development proposal must be valid or extended. The planning permission is the key decision/approval which must be valid at all times before the building plan can be approved. However the defendant contended that Mesyuarat Jawatankuasa Pusat Setempat MPSJ Bil 15/2011 on 2 August 2011 had approved the building plan on the same date and not on 28 December 2011. Therefore, the defendant submitted that on the date of approval ie, 2 August 2011, the planning permission of 5 October 2010 was still valid.

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[47] It is clear that the approval for the building plan only took effect on 28 December 2011 where at this stage the planning permission has already expired. Therefore, I am unable to agree with the defendant contention that the approval for building plan was on 2 August 2011 as the plaintiff's notification at para. 2 clearly states that:

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Untuk makluman tuan, Mesyuarat Jawatankuasa Pusat Setempat (OSC) MPSJ Bil 15/2011 bertarikh 2.8.2011 telah bersetuju meluluskan permohonan kelulusan pelan bangunan bagi cadangan diatas. Syarat-syarat kelulusan adalah seperti berikut:

D

2.1 Kelulusan ini sah dari 28.12.2011 sehingga 27 dalam tempoh satu (1) tahun iaitu.12.2012 ...

E

[48] The plaintiff submitted that it was a mistake in approving the building plan as it was not aware that the planning permission had lapsed. However, I am of the view that regardless whether the approval was done by mistake or otherwise, it does not automatically validate the planning permission and it would be contravening s. 20 of the TCPA 1976:

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Prohibition of development contrary to planning permission

Section 20. No person shall commence, undertake, or carry out any development otherwise than in conformity with the planning permission granted to him under section 22 in respect of the development or with the conditions of the planning permission.

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[49] Since the planning permission had expired on 5 October 2010, it follows that the building plan which was approved on 28 November 2011 and the notice of commencement of building works submitted by the defendant on 16 March 2012 is invalid, void and has no legal effect. In *Sumita Development (M) Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2014] 9 CLJ 406, the court held:

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(21) Generally, the starting point in any development is the planning permission which is the main decision and all other approvals are subsidiary to it. Hence, building plans, earthworks or commencement of work etc are all approvals that must be sought but only after planning permission has been obtained. Once planning permission is rejected or expires, or is not renewed or extended, then everything else falls as a natural consequence. The latter approvals have no independent existence and are all incidental to the planning permission.

I

A [50] On the issue of legitimate expectation despite the fact that the defendant had not extended the planning permission prior to the commencement of building works, the plaintiff submitted that the its conduct in mistakenly approving the building plan for hotel accommodation does not give rise to a legitimate expectation on the part of the defendant that they can
B apply for a housing developer's licence for serviced apartment and an advertisement and sale permit for serviced apartment and to commence work at the site pursuant to the building plan. I am in the agreement with the plaintiff because the defendant cannot rely on it. The doctrine of legitimate expectation applies depends on the facts of each case and should not override
C the express statutory requirement where in this case the defendant failed to comply. I am unable to see any unfairness or conduct of the plaintiff which the defendant had suffered inconvenience in the matter of the extension of the planning permission.

D [51] The doctrine of legitimate expectation cannot create a right when such right does not exist. In *North East Plantations Sdn Bhd v. Pentadbir Tanah Daerah Dungun & Satu Lagi* [2011] 4 CLJ 729 the Federal Court held that whether or not the doctrine legitimate expectation applies depends on the facts of each case, it cannot and should not override the express statutory power vested in the State Authority.

E [52] In *Government of the State of Sarawak v. Lah Anyie & Ors* [2013] 6 CLJ 133 the Court of Appeal held:

F The doctrine of legitimate expectation cannot create a right when such right does not exist but may give some form of limited relief to the litigant if there is some unfairness or conduct which led the litigant to suffer inconvenience or damages. To entail the litigant to obtain the relief, it must be pleaded in the right perspective and cannot be claimed based on a purported right which the law does not recognize under s. 5 of the Land Code. The fact that the government authorities had conducted themselves in a manner to support the Plaintiff's claim could not be a basis
G in law to invoke the jurisprudence relating to legitimate expectation to assert a right which the law does not recognize.

[53] The third issue is whether the hotel suite may be sold individually or separately to any person and whether the sale of the hotel suite by the defendant constitutes a contravention of the planning control and/or the planning permission granted by the plaintiff.

H [54] The defendant submitted that the most crucial evidence of the defendant's intention to sell the hotel suites lies in the submission of building plan for the construction of the show gallery and sale office to the plaintiff and was approved by the plaintiff on 30 October 2011 subject to certain conditions. The show gallery, according to the defendant, clearly signified
I that the hotel suites were for sale and it is not uncommon for hotel suites to be up for sale to the public. I am mindful that the Building Plan No MPSJ/BGN/KW/A - 6/156 (26) for the exhibition space and sales office was

submitted on 21 April 2011 as a separate application under the Street, Drainage and Building Act 1974 and was approved on 30 October 2011 until 29 October 2012.

[55] I observed that the construction of exhibition space and sale office was not included in the “tambahan kepada hotel sedia ada” and was not listed out as a component of the proposed development in the planning permission. Likewise, the development proposal report for the proposed development also did not refer at all to the component of exhibition space and sales office. At the same time, I am of the opinion that the existence of exhibition space and sale office cannot be assumed to solely facilitate the sale of hotel suites. Having examined the planning permission and the layout plan approved on 5 October 2010, I find that the exhibition space and sale office are not related to the planning permission and did not specify that it was meant for the sale of hotel suites.

[56] The defendant also submitted that on 19 February 2012, the Ministry of Housing and Local Government (MHLG) granted to the defendant a housing developer license from 28 February 2012 to 27 February 2017 and an advertisement and sale permit for a period of (1) year from 25 March 2012 to 20 March 2013 for serviced apartment. The license and permit issued by MHLG were complete and in order. Following such approval, the defendant had advertised and sold the hotel suite to the public. Out of 1989 hotel suites, 1200 units were sold to the public. The sale of the hotel suites is regulated in the Housing Development (Control and License) Act 1996 (HDA) with relevant Regulations which is intended to provide for control and licensing of the business of housing development for the protection of the interest of purchasers and is in the purview of MHLG and not the plaintiff. The application for the license was based on strata development and type of residence is serviced apartment. The plaintiff objected the selling of the hotel suites for reasons the units are for hotel accommodation and are not meant for sale. On the other hand, the defendant contended that the hotel suites are serviced apartment and therefore these units can be put up for sale to the public.

[57] I observed the advertisement and sale permit together with Housing Developer’s Licence was approved by MHLG upon the defendant’s declaration that the Building Plan No: MPSJ/BGN/KW/A-6/162 (22) was for 1,989 units of serviced apartment. The defendant also stated that the development is a strata development and that hotel suites are serviced apartment when in actual fact, the planning permission is been granted only for hotel accommodation. I find that the issuance of the advertisement and sale permit together with Housing Developer’s Licence was under the pretext of the sale of serviced apartment. Therefore, the advertisement and sale permit together with Housing Developer’s Licence granted, though are valid, is not applicable and of no legal effect to the hotel suites. Furthermore, the selling of hotel suites as serviced apartment is contrary to the planning permission and would tantamount to unilaterally change the use of the land

- A from hotel accommodation to serviced apartments. This obviously had deviated from the planning permission, local plan, manual guidelines and planning standards of State of Selangor. It follows that the defendant is not permitted to proceed with the sale of the hotel suite as it constitutes a contravention of the planning control and/or the planning permission granted by the plaintiff.
- B

- [58] Having dealt with the issues above, I find that the grant of planning permission by the plaintiff was made in the public interest so as to ensure that all the existing amenities and infrastructure is in accordance with the local plan and the planning guidelines for the good of all. In this present case, the protection of the public interest is entrusted to the plaintiff. The facts of this case shows that the defendant has contravene ss. 18 and 19 or 20 of TCPA 1976 and also committed a breach of planning control by deviating or departing from the planning permission granted for hotel suites. As the breach of planning control has taken place it has become imperative that further building works for serviced apartment and alteration and addition to the existing hotel building be prevented. The plaintiff is required to uphold planning procedures and to ensure that the defendant does not pre-empt the statutory procedures which had been laid down. The plaintiff's refusal for the construction of serviced apartment on the said lots is undesirable owing to the local plan and the original express condition in the land title and the effect on the public and neighbouring owners and the possible traffic implications.
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- D
- E

- [59] Having heard the evidences before me and submissions from both learned counsel and after having given much consideration, I, on the balance of probabilities, finds that the plaintiff's claims against the defendant is allowed. I also find that the defendant is not entitled for damages under the counterclaim for reason that the defendant cannot take advantage of their own wrongdoing. Therefore the defendant's counterclaim is dismissed. Costs of RM120,000 to be paid by the defendant to the plaintiff.
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